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Which Way to the Beach - Public Access to Beaches for Recreational Use

Mary Lowndes Bryan

NOTES

WHICH WAY TO THE BEACH? PUBLIC ACCESS TO BEACHES FOR RECREATIONAL USE

Tidelands rhetoric sounded in South Carolina for a decade before the passage of the Coastal Zone Management Act[1] in May of 1977. Two premises underlay legislative efforts to control the use and development of the State's coastal lands: the recognition of the tidelands[2] as uniquely vital and vulnerable ecosystems critical to the protection of inland regions from erosion, flooding, and storm damage, and the affirmation of the coastal zone as a resource of the whole State in which the public has clear economic and social interests. The public interest in access to the seashore, peculiar in its history and its character, is the subject of this note. Specifically, what rights does the public have in access to beaches for recreational use? Under what legal theories and legislative enactments may these rights be defined and assured in harmony with the rights of private landowners and with concomitant state interests in the preservation of the beaches?

This note surveys common law in South Carolina and other states, pertinent statutory law outside South Carolina, and federal and state coastal management legislation bearing on questions of public access to beaches. A discussion of the public trust doctrine in South Carolina sets out the public right to use the foreshore or wet-sand beach. Leading cases from other states are explored to illustrate the kinds of problems that have produced litigation over the use and development of oceanfront property and the theories advanced to resolve these conflicts. Several South Carolina cases that will bear on future judicial determinations of rights of access are analyzed. Statutory law in other states specifically addressing the question of public rights to beach ac-

1. S.C. CODE ANN. §§ 48-39-10 to -220 (Cum. Supp. 1977).

2. *Id.* § 48-39-10(G). The Coastal Zone Management Act defines "tidelands" as "all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved." *Id.* For a discussion of the meaning of the term and the importance of the whole tidelands area, see Wyche, *The Law of Tidelands in South Carolina,* ENVIRONMENTAL LAW IN SOUTH CAROLINA: SELECTED TOPICS (G. Poliakoff ed. 1977) at 81-85.

cess is surveyed and compared in terms of its effectiveness with the express and implied protections of the present South Carolina legislation. Finally, the South Carolina Coastal Zone Management Act and the federal legislation that fostered the Act will be examined with respect to their effects on existing and prospective public rights of access to beaches.

Even without beach access legislation, existing South Carolina law supports public rights to recreational use of beaches, sets out common-law tests to determine particular rights in particular shorefront property, and provides specific protection of established public rights through laws effecting coastal zone permitting authority and erosion control.

I. THE PUBLIC TRUST DOCTRINE AND THE FORESHORE IN SOUTH CAROLINA

The question of public rights to access and recreational use of the seashore can best be addressed by delineating and considering separately the two contiguous strips of land generally at issue: the foreshore or wet-sand beach, the land between the ordinary high- and low-water marks; and the dry-sand beach, the land between the mean high-water mark and the line of vegetation.[3] The express purposes of recent legislation and the clear weight of common law in South Carolina and other states[4] appear to secure the public right to use the foreshore for recreational purposes in South Carolina. The American doctrine of the public trust forms the basis for public rights to the foreshore.[5] The doc-

3. *See* Letter from Kenneth P. Woodington, Assistant Attorney General of South Carolina, to John D. Bradley, III (March 30, 1977); *See* note 21 and accompanying text *infra.*

4. For acknowledgment of state ownership and public rights in the foreshore as "givens" in considering beach access, see Note, *Public Access to Beaches: Common-Law Doctrines and Constitutional Challenges,* 48 N.Y.U.L. REV. 369, 380 (1973); Note, *Public Access to Beaches,* 22 STANFORD L. REV. 564, 565 (1970); and Eckhardt, *A Rational National Policy on Public Use of the Beaches,* 24 Syracuse L. Rev. 967, 968-69 (1973).

5. For discussion of the English common-law theory of *jus publicum,* South Carolina land grants, and the origin of the public trust doctrine in South Carolina, see Shively v. Bowlby, 152 U.S. 1 (1894), and Wyche, *supra* note 2 at 87-90.

In Shively v. Bowlby, 152 U.S. 1 (1894), the United States Supreme Court documented the historical development of the doctrine:

> In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, below ordinary high water mark, is in the King, except so far as an individual . . . has acquired in it by express grant, or by prescription or usage . . . and that this title, *jus privatum,* whether in the king or in a subject, is held subject to the public right, *jus publicum,* of navigation and fishing.
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> . . . .

trine creates a presumption and a right: title to the foreshore is presumed to be in the sovereign unless title has been expressly granted to the low-water mark; and the title is subject to the public's rights to use the foreshore for navigation and fishing whether the titleholder is the sovereign or a private citizen.

Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co.[6] is the leading South Carolina case recognizing the common-law right of the public to the foreshore. The case arose from a dispute over oyster beds leased to the defendants by the State Board of Fisheries, but allegedly located on plaintiff's property. The court upheld a presumption of title in the State because plaintiff's conveyance contained no specific language making the low-water mark the boundary: "The title to land below the high-water mark on the tidal navigable streams, under the well-settled rule, is in the state, not for the purpose of sale, but to be held in trust for public purposes."[7] Therefore, the leases by the State of land between the high- and low-water marks were valid.[8]

> The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it had been modified by the charters, constitutions, statutes or usages of the . . . States or by the Constitution and laws of the United States.
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> . . . .
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> In South Carolina, the rules of the common law, by which the title in the land under tide waters is in the State, and a grant of land bounded by such waters passes no title below high water mark, appear to be still in force.

Id. at 13-14, 25. This statement interpreting South Carolina law by Justice Gray speaking for the Court was quoted by the South Carolina Supreme Court in Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co., 148 S.C. 428, 435, 146 S.E. 434, 437 (1928), and in State v. Hardee, 259 S.C. 535, 540-41, 193 S.E.2d 497, 500 (1972).

For a discussion distinguishing the doctrines of *jus publicum* and public trust as they have been applied by various state courts, see Note, 48 N.Y.U.L. REV., *supra* note 4, at 380-90. *See generally* Clineburg & Krahmer, *The Law Pertaining to Estuarine Lands in South Carolina*, 23 S.C.L. REV. 7 (1971).

6. 148 S.C. 428, 146 S.E. 434 (1928).

7. *Id.* at 438, 146 S.E. at 438. The court bases this "well-settled rule" on Shively v. Bowlby, 152 U.S. 1 (1894); Hardin v. Jordan, 140 U.S. 371 (1891); State v. Pinckney, 22 S.C. 484 (1884); State v. Pacific Guano Co., 22 S.C. 50 (1884). See note 5 *supra*.

8. The prevailing defendants held a "lease from the board of fisheries of the state, acting under an act of the General Assembly, covering all lands on which they were operating." 148 S.C. 428, 146 S.E. 434, 436.

There has been continuing controversy stemming from the facts of *Cape Romain*. Only 6.2 acres of the disputed 34,000-acre tract were located above the high-water mark. Judge Cothran argued vigorously that the grant by the State to plaintiff therefore was without effect unless the boundary was intended to be at the low-water mark. Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co., 148 S.C. at 439-42, 146 S.E. 438-40 (Cothran, J., dissenting). *See* Lane v. McEachern, 251 S.C. 272, 162 S.E.2d 174 (1968) (claimant proved title to an entire tract located below the mean high-water mark).

The presumption of title to the foreshore in the State held in trust for the public has been consistently confirmed in South Carolina Supreme Court decisions.[9] Of particular interest regarding the application of the public trust when title is not clear is the language of the court in *Rice Hope Plantation v. South Carolina Public Service Authority,*[10] an action for damages resulting from the construction and operation of a dam on the Santee River. Citing *Cape Romain* with approval, the court did not decide the question of ownership: "[W]e do not deem it necessary or proper upon this appeal to determine under what circumstances . . . title might be acquired by private owners, because any such ownership would be, in our opinion, subject to the dominant power of the government (State and Federal) to control and regulate navigable waters."[11] The significance of the *Rice Hope* holding is that the tidal character or navigability of waters bordering the lands, rather than the determination of private or State ownership, makes the property between the high- and low-water marks subject to the public trust.

The *Cape Romain* public trust doctrine is expressly incorporated in the South Carolina Coastal Zone Management Act with an interesting addition.[12] At common law, an exception to the

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The alienability of tidelands owned by the State has been judicially approved. *See* cases cited in Wyche, *supra* note 2, at 101 n.109. For a discussion of alienability, case law, and statutes affecting particular lands and interests, see *id.* at 101-06.

9. State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (1972); Rice Hope Plantation v. South Carolina Public Service Authority, 216 S.C. 500, 59 S.E.2d 132 (1950). In *Hardee* the supreme court, relying on the rule of *Cape Romain* as reaffirmed in *Rice Hope,* enjoined the development of land below the high-water mark of Salt Creek at Pawley's Island. Note Justice Bussey's lengthy opinion, concurring in the result, but arguing that the presumptions and the public trust language in *Cape Romain* and *Rice Hope* are dicta and that tidelands continue to be subject to grant and private ownership in South Carolina. 259 S.C. at 543, 193 S.E.2d at 501. *See also* State v. Yelsen Land Co., 265 S.C. 78, 216 S.E.2d 876 (1976) (relying on Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co., 148 S.C. 428, 146 S.E. 434 (1928), for presumption of title in the state); State v. Beach Co., No. 75-cp-10-7 (9th Jud. Cir. S.C. July 20, 1977) (following *Cape Romain*); County of Darlington v. Perkins, slip op. at 5-9 (C.P. Darlington County, S.C. Sept. 17, 1976), *aff'd.*, No. 20539 (S.C. Sup.Ct., filed Nov. 15, 1977). (The court documents the public trust in common law, state decisional law, and in the State constitution, and notes that "private ownership does not otherwise alter application of the trust doctrine." *Id.* at 9).

10. 216 S.C. 500, 59 S.E.2d 132 (1950).

11. *Id.* at 530, 59 S.E.2d at 145. *See also* Wyche, *supra* note 2, at 92-94, 97-101, 107 (discussing the notion of navigability and concluding that for purposes of the public trust, the terms "tidal" and "navigable" may be used interchangeably or with equal weight to include lands in the trust).

12. S.C. CODE ANN. § 48-39-120 (Cum. Supp. 1977).

presumption of title in the State occurred when land accreted beyond the original high-water mark.[13] The resulting increase in the dry-sand beach belonged to the owner of the property contingent to the accreted property. A controversial section of the South Carolina Act empowers the Council to issue erosion control structures with the proviso that accreting or increasing oceanfront property shall now accrue to the State, not to the private land owner:

> *Provided* . . . that no person or governmental agency may develop ocean front property accreted by natural forces or as the result of permitted or nonpermitted structures beyond the mean high-water mark as it existed at the time the ocean front property was initially developed or subdivided, and such property shall remain the property of the State held in trust for the people of the State.[14]

Retroactively applied, this proviso could be susceptible to attack as an unconstitutional taking of property without compensation.[15] Prospectively applied, the proviso would extend the presumption of title in the State and the operation of the public trust restrictions to beach property below the high-water mark at the time of development; these lands would otherwise have belonged to the owner of the land accreted, free of the public trust. This naturally accreted land would then be public land for the purposes of the trust and by the proviso could not be developed by the State or by a private person.

At common law, the scope of possible uses under the public

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13. "Accretion" is defined as "the gradual and imperceptible accumulation of land by natural causes as out of the sea or a river." BLACK'S LAW DICTIONARY 36 (4th rev. ed. 1968).

14. S.C. CODE ANN. § 48-39-120 (Cum. Supp. 1977). A South Carolina Senate bill, S.543, is now pending. The bill would repeal this proviso and leave only the language "that no property rebuilt or accreted as a result of a permitted or nonpermitted structure shall exceed the original property line or boundary." S. 543, 102d Gen. Ass., 2d Sess. (1978). This amendment would limit the Act to a codification of the common-law rule that a landowner may not use artificial means to increase his property by accretion. The Act would no longer affect the common-law rule that naturally accreted land accrues to the owner of the land increased. As at common law, the public trust would then continue to include only lands below the presently existing mean high-water mark and not lands below the mean high-water mark that existed at the time of the initial development or subdivision. Regarding the application of South Carolina law affecting accreted land, see Epps v. Freeman, 261 S.C. 375, 200 S.E.2d 235 (1973); State v. Beach Co., No. 75-cp-10-7, slip op. at 29 (9th Jud. Cir. S.C. July 20, 1977); and notes 80 and 100 and accompanying text *infra*.

15. *See* notes 48-51 and accompanying text *infra*.

trust extended only to navigation and fishing. Today the public interest clearly extends to recreational use of the foreshore as well; this is particularly true in South Carolina, where tourism is a vital and critical industry. Although there has been no judicial extension of the doctrine to include recreation in South Carolina, there appears to have been no occasion for such a holding.[16] The public trust doctrine has been interpreted to include recreational purposes by various courts of other states[17] and by the South Carolina Attorney General.[18]

The idea of the State managing land in the public trust is central in coastal management legislation providing for the protection, restoration, and carefully regulated development of coastal areas. The language declaring legislative findings and policies in the South Carolina Coastal Zone Management Act emphasizes recreational, natural, cultural, economic, and social values and clearly supports the inclusion of recreational activity among the public purposes for which the State holds land for the people.[19] Recently the General Assembly, prefacing an act to control pollution from oil spills, also proclaimed "that the highest and best use of the seacoast of the State is as a source of public and private recreation."[20] The legislative intent of these two acts

16. *See* Wyche, *supra* note 2, at 107-16 (analysis of the scope of the public trust in South Carolina).

17. *See* The Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 309-10, 294 A.2d 47, 54-55 (1972); Arnold's Inn, Inc. v. Morgan, 63 Misc. 2d 279, 283, 310 N.Y.S.2d 541, 547 (Sup. Ct. 1970); State *ex rel.* Thornton v. Hay, 254 Or. 584, 594, 462 P.2d 671, 679 (1969).

18. *See* [1964-65] OP. S.C. ATT'Y GEN. 183.

> The State of South Carolina has absolute title to Submerged Lands, (the area below the mean low-water mark), in the navigable waters of the State. The State of South Carolina has *prima facie* title to Tidelands (marshlands), (the area between the mean high-water mark and the mean low-water mark), in and adjacent to the navigable waters of the State. The State of South Carolina holds the Tidelands, Submerged Lands and Navigable Waters in trust for and subject to the public purposes and right of navigation, commerce, fishing, bathing, recreation or enjoyment, and other public and useful purposes, or such other rights as are incident to public waters at common law, free from obstructions and interference by private persons.

Id.

19. S.C. CODE ANN. §§ 48-39-20 to -30 (Cum. Supp. 1977).

20. *Id.* § 43-43-520(1)-(2). The Act continues:

> The General Assembly further finds and declares that the preservation of this use is a matter of the highest urgency and priority, and that such use can only be served effectively by maintaining the coastal waters, estuaries, tidal flats, beaches, and public lands adjoining the seacoast in as close to a pristine condition as possible, taking into account multiple use accommodations necessary to provide the broadest possible promotion of public and private interests.

Id. § 43-43-520(2).

appears to embrace recreational use of the foreshore among the public purposes protected by the public trust.

In summary, the doctrine of the public trust in South Carolina presumes that title to the foreshore is in the State unless the conveyance expressly grants that land to the low-water mark. Even if the title is unclear, the tidal character of the land impresses it with the public trust for public purposes. By implication and express statutory policy, these public purposes include recreational use of the foreshore as well as the traditional rights of navigation and fishing.

II. THE BASIC QUESTION: PUBLIC ACCESS TO DRY-SAND BEACHES

The public trust doctrine supports only the right to public use of the foreshore, the land between the mean high- and low-water marks. Recreational use, however, ordinarily envisions dry-sand beach also, generally the area between the high-water mark and the line of vegetation.[21] Two problems arise from the interplay between the established legal right of the public to use the foreshore and the growing public desire for recreational use of the dry-sand beach. Mr. Justice Francis of the New Jersey Supreme Court aptly phrases the first: "Since the people generally have the common right to use and enjoy the ocean and the portion of the beach below the mean high-water mark, of what utility is that right if access from the upland does not exist or is refused by the upland owner?"[22] Second, what are the public's rights to use the dry land for sunbathing, picnicking, strolling, shell collecting, and similar recreational pursuits? Obviously public access is not a problem at all until too little of it exists, by virtue either of expanding recreational demands or of reduced access and available dry-sand space resulting from landowners' efforts to cut off or limit established uses. Litigation over public access to beaches for recreational purposes has arisen in two types of situations: the first involves a landowner who attempts to reserve his beachfront area by enclosure or obstruction for the exclusive use of paying guests and, by implication, for other private uses. In the second, a municipality attempts to restrict use of the beach when publicly

21. *See* Eckhardt, *supra* note 4, at 969 n.7 and accompanying text. The line of vegetation is generally understood to be "the extreme seaward boundary of natural vegetation which typically spreads continuously inland." *Id.*

22. Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. at 312, 294 A.2d at 56 (Francis, J. dissenting).

owned and operated beaches and their facilities become overcrowded.

The public does have rights to some dry-sand beaches. Various common-law theories and statutory pronouncements have been advanced to confirm and protect public rights in the dry-sand beach for access and recreational use. The courts have confirmed public rights under the theories of prescriptive easement, express and implied dedication, and customary right, relying on traditional legal principles. The careful distinction underlying these decisions, however, is the difference between creating a new right and recognizing a right that has been legitimately acquired. The courts generally agree with the Florida Supreme Court that notions of the "need to preserve beaches for public recreation [do not authorize] the taking of such beaches from their lawful owners."[23] Further, the idea has been resoundingly rejected that the right of the public in the foreshore impresses all adjacent upland property with an easement for access.[24]

The cases discussed in this section represent major attempts by the courts to resolve the questions of private and public rights in beachfront property outside South Carolina. The cases are divided into two groups: those involving public use of individual tracts of privately owned property, and those involving nonresident use of municipally owned land. These decisions turn on the application of the property law theories of easement by prescription, dedication, customary rights, and the public trust.

A. Enclosure, Obstruction, and Established Public Right

Four leading decisions from states other than South Carolina illustrate the theories successfully propounded on behalf of the public right to beach access: *Gion v. City of Santa Cruz*,[25] *City*

23. City of Daytona Beach v. Tona-Rama, Inc., 271 So. 2d 765, 769 (Fla. 1972), *rev'd in part*, 294 So. 2d 73 (Fla. 1974).

24. *See* Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. at 312-13, 294 A.2d at 56-57. Justice Francis observed that "the majority opinion disclaims any positive ruling on the subject . . . [G]enerally speaking reasonable access to the ocean and to the land strip [foreshore] which is in the public domain cannot be denied, but the law does not require that such access be without limitation or qualification." *Id.* at 312-13, 294 A.2d at 56.

Citing Hughes v. Washington, 389 U.S. 290 (1967), the court in State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969), distinguishes the easements in dry-sand beach created by dedication, prescription, or grant and protected by Section 390.610 of the Oregon Code (1967)(current version at Or. Rev. Stat. 390.610 (1977)), and a statutory interpretation of § 390.610 that would declare an easement in all dry-sand beach: "The

of Daytona Beach v. Tona-Rama, Inc.,[26] *State ex rel. Thornton v. Hay*,[27] and *Seaway Co. v. Attorney General.*[28] All five actions (*Gion* was consolidated with another suit: *Dietz v. King*[29]) were brought to enjoin the obstruction of access and use by barriers erected on the dry-sand beach and on access ways leading to the beach.[30] In each case, copious evidence was presented of long, continuous, and notorious public use of the beach areas, without serious interference or permission[31] by the owner; public police and sanitation services to the areas were also provided.[32] In addition to common-law theory, each court pointed to some statutory

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state concedes that such legislation cannot divest a person of his rights in land." *Hay* at 590-91, 462 P.2d at 674-75.

The Texas Court in Seaway Co. v. Attorney Gen., 375 S.W.2d 923 (Tex. Civ. App. 1964) noted the State's argument that enjoyment of the seashore, held in trust for the public, required a means of access: "[T]herefore the sovereign has no power to cut off convenient access. We know of no such rule of law." *Id.* at 930. Interpreting the applicable statute, the court found the policy of the State to be "that the public shall have the unrestricted right of ingress and egress to the State-owned beaches or . . . to the seaward side of the line of vegetation . . . in the event the public has acquired an easement . . . ." *Id.* at 930 (emphasis added).

26. 271 So. 2d 765 (1972), *rev'd in part* 294 So. 2d 73 (1974).

27. 254 Or. 584, 462 P.2d 671 (1969).

28. 375 S.W.2d 923 (Tex. Civ. App. 1964).

29. 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

30. The courts focused on the dry-sand areas, and in *Gion* and *Dietz*, on the access ways as well. In no case was the public right to use of the foreshore questioned. Representatives concerned with the public interest brought each action: the attorneys general in *Seaway* and *Thornton*, the city in *Gion*, a citizens' group in *Dietz*, and a neighboring landowner in *Tona-Rama*.

Although plaintiff in *Tona-Rama* framed his complaint in terms of public use, this particular action may be styled a private use by the public. The plaintiff-landowner, who protested the city's issuance of a building permit for his neighbor's observation tower, also operated an observation tower on a nearby site. One might suspect that the second tower's attraction of the public might be more injurious to plaintiff than any alleged deterrence of public use. The standing of parties who are private citizens may present problems where the appropriate public officer will not or cannot bring an action on behalf of the public. *See* United States Steel Corp. v. Save Sand Key, Inc., 303 So. 2d 9 (Fla. 1974). In *Save Sand Key* a nonprofit incorporated citizens' group alleged rights acquired by prescription, dedication, and custom in an island owned by the defendant. The attorney general took a voluntary nonsuit and the case was dismissed because plaintiff alleged no special injury apart from injury to the general public.

31. In Seaway Co. v. Attorney Gen., 375 S.W.2d at 933-36, and Gion v. City of Santa Cruz, 2 Cal. 3d at 44, 465 P.2d at 60, 84 Cal. Rptr. at 172, the courts observed that an owner's permission to a few people does not alter the rights acquired independently by many people.

32. Only in Dietz v. King, which was heard with *Gion*, was there no municipal service; but "the public nonetheless treated the land as land they were free to use as they pleased." 2 Cal. 3d at 44, 465 P.2d at 59, 84 Cal. Rptr. at 171.

authority supporting the policy of public access to beaches,[33] but in no case was a statute controlling.

The common-law finding of an easement by prescription requires continuous use under a claim of right in the users, a use adverse to the owner, for a statutory period.[34] Plaintiffs in each of the above cases alleged that the public had acquired an easement by prescription in the land at issue. In *Tona-Rama* the court refused to find an easement, holding that public use of the defendant landowner's beach was not adverse but rather in his interest since he operated an ocean pier and other tourist attractions on the same property.[35] The courts in *Seaway* and *Thornton* found that easements had been acquired by the public, but both decisions rely only incidentally on this theory. The *Gion* and *Deitz* court applied a common sense analysis, demonstrating that, regardless of legal presumptions, the real issues are factual and an easement by prescription in the public requires essentially the same proof as dedication by adverse use.[36]

The doctrines of implied dedication and customary rights were more successful. Implied or common-law dedication includes the easement requirement of continuous use, without interference, under a claim of right in the users. Unlike prescriptive easements, dedication does not ordinarily require a statutory period, applies only to a public claim of right, and requires the owner's expression of intent or acquiescence in dedicating the land for public use. Actual use by the public ripens into a right and the dedication becomes irrevocable.[37] The landowner's requisite intent in dedication theory, like the element of adverseness in prescription theory, makes the analysis of asserted public rights in shorelands strained.

Decisions applying a dedication theory show a wide range of

33. Texas and Oregon are pioneers in beach access legislation. See notes 97-131 and accompanying text *infra*.

34. For an analysis of the characteristics of adverseness and claim of right in prescriptive easements, *see generally* 4 TIFFANY REAL PROPERTY §§ 1191, 1196, 1196.1, 1197 (3rd ed. 1975) [hereinafter cited as TIFFANY].

35. 294 So. 2d at 77.

36. *See* 4 TIFFANY, *supra* note 34, § 1211. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970), is cited as authority for the acquisition of highway rights by prescription. "[D]edication can be proved by showing acquiescence of owner under circumstances negating license or by establishing open and continuous use by public for prescriptive period." 4 TIFFANY, *supra* note 34, § 1211 n.1.

37. For discussion of the general public as the only beneficiary of dedication, of the owner's intention to dedicate as a question of fact, and of public use as evidence of dedication, see 4 TIFFANY, *supra* note 34, §§ 1099, 1101-02.

discretion in the degree of clear intent or acquiescence required. In *Seaway* the court held that when an owner's visible conduct encourages or does not seriously discourage public use, the owner will be estopped to deny his intent to dedicate when the public has acquired rights through continuous use.[38] From the same kind of acquiescence, the court in *Gion* found an intent to dedicate the land or at least an easement in it.[39] Finding no intent to dedicate and declining to presume this intent from acquiescence, the *Thornton* court summarily dismissed the doctrine.[40]

The *Thornton* decision resurrected the English doctrine of customary rights, selected by the court for its simplicity and singular fitness to the efficient resolution of future dry-sand disputes. Acknowledging that many elements of prescription were present in the case, the court announced a departure from established routes:

> The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom . . . can be proven with reference to a larger region. Oceanfront lands from the northern to the southern border of the state ought to be treated uniformly.[41]

Emphasizing the "unique nature of the lands in question,"[42] the court applied Blackstone's seven requisites of a particular custom: the use must be ancient, without interruption, peaceful, reasonable, certain of description, obligatory to affected landowners, and not repugnant to or inconsistent with other customs or law.[43] This opinion suggests that the requirements of an adverse public use or an intent to dedicate make prescription or dedication inappropriate to questions of public rights to use of beach property. The *Thornton* court presumed instead that landowners

38. 375 S.W.2d at 935-37. *But see* 4 TIFFANY, *supra* note 34, § 1110 (distinguishing the theories of dedication and estoppel and criticizing confusion of the doctrines by the courts).

39. 2 Cal. 3d at 38-41, 465 P.2d at 55-57, 84 Cal. Rptr. at 167-69. Note that *Gion* applied a prescriptive period of five years. *See* note 25 *supra.*

40. 254 Or. at 592-93, 462 P.2d at 675.

41. *Id.* at 595, 462 P.2d at 676.

42. *Id.*

43. *Id.* at 595-97, 462 P.2d at 677 (citing 1 W. BLACKSTONE, COMMENTARIES *75-*78). The requirement of obligation is interpreted to mean acquiescence without option or question on the part of the landowner.

have notice of the custom of public recreational use of dry-sand beaches. The *Thornton* rule is held to be "salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his."[44]

The court in *Tona-Rama* cited *Thornton* in confirming public rights based on the customary use of the dry-sand beach. Despite its approval of the doctrine, the court found for defendant, who had, after all, already completed his observation tower on the beach. Because the construction of the tower was not inconsistent with public recreational use of the beach and violated no acquired public right, its approval was not beyond the city's authority to grant building permits. Dictum in the case provides that even a public easement would not preclude the owner's use of the land in any way consistent with the easement.[45] The sweeping intent of *Thornton* was not adopted in *Tona-Rama* to affect the entire coastline. The language of the Florida court plainly envisions a parcelled approach: "The general public may continue to use the dry-sand area for their usual recreational activities . . . because of a right gained through custom to use *this particular area* of the beach as they have without dispute and without interruption for many years."[46]

The *Tona-Rama* decision highlights two limitations in any confirmation of public rights in dry-sand beaches. First, a theory confirming public rights would not prevent development that allows reasonable access and use of the land in question. Second, avoiding tract-by-tract resolution of access conflicts in developed areas may well be impossible, even under the customary rights doctrine.[47] Because it allows consideration of the realities of use

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44. *Id.* at 599, 462 P.2d at 678.

45. 294 So. 2d at 77 (citing 3 TIFFANY REAL PROPERTY § 811 (1939)). The court also observed that the right of customary use does not create any interest in the land itself and that the landowner cannot revoke the right, although the right is subject to "appropriate governmental regulation" and may be abandoned by the public. *Id.* at 78.

46. 294 So. 2d at 78 (emphasis added).

47. Finding the *Thornton* ruling dispositive of the issue of public rights in the dry-sand beach, the Oregon Supreme Court applied its doctrine of uniform treatment of the Oregon coast in State Highway Comm'n v. Fultz, 261 Or. 289, 491 P.2d 1171 (1971). But a later Oregon Appellate Court decision confirmed the right of the public to acquire an *easement* in the dry-sand area, citing *Thornton* without reference to customary rights. State *ex rel.* Johnson v. Bauman, 7 Or. App. 489, 492 P.2d 284 (1971).

The issue in *Johnson* was whether the attorney general or the State Highway Commission was authorized by statute to bring a declaratory judgment action to find a recreational easement in property including foreshore and dry-sand up to and landward of the vegetation line. Regardless of statutory authorization, the court could have disposed of

and ownership, uncluttered by indicia of adverseness and intent, the customary rights doctrine will probably be more useful for the nature of proof it requires than for its universal applicability.

The specter of taking hovers at the fringes of every action claiming an acquired public right. A uniform application of the customary rights doctrine, without evidence pertaining to particular tracts, would appear to be as susceptible to constitutional challenge as a statutorily declared easement for access in dry-sand and upland property.[48] Asserting that the interpretation and enforcement of the State statute by the Oregon Supreme Court in *Thornton* effected a taking of their property without compensation, defeated defendants in *Thornton* brought their case to federal court in *Hay v. Bruno*.[49] The district court found that the documented public use of the disputed property and the landowner's knowledge of this use supported the trial court's finding of a recreational easement by implied dedication and the Oregon Supreme Court's acceptance of that finding. Even though *Thornton* was explicitly based on the doctrine of customary rights, rather than on prescription or dedication, no taking could occur by an "unpredictable change in the state's property law"[50] when the factual burdens of proof to confirm an established public right in the property so clearly had been met.[51]

Hay v. Bruno suggests, notwithstanding statutory policy supporting public access to beaches and the doctrine of customary rights, that the resolution of disputed public and private rights in the dry-sand beach will finally turn on factual determinations of the amount of public use of particular tracts. Whatever

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the questions concerning the land seaward of the vegetation line if the *Thornton* holding were controlling. Therefore, it is not clear whether the customary rights theory will be controlling in all Oregon dry-sand disputes.

48. See Black, *Constitutionality of the Eckhardt Open Beaches Bill*, 74 COLUM. L. REV. 439 (1974) and note 15 and accompanying text *supra*, and note 140 and accompanying text *infra*.

49. 344 F. Supp. 286 (D. Or. 1972).

50. *Id.* at 288-89. The court distinguished Hughes v. Washington, 389 U.S. 290 (1967), in which the Supreme Court overruled a state court decision that had suddenly altered Washington law regarding the ownership of accreted land. Public rights and the landowner's knowledge of public use in *Bruno* long preceded statutory expression or judicial affirmation of the easement in question. 344 F. Supp. at 289.

51. 344 F. Supp. at 289. Acknowledging the State court's discretion to elect its own theory, the district court pronounced that "the decision of a state court on a question of law, even though wrong and contrary to previous decisions, does not constitute a violation of the Fourteenth Amendment merely because it is wrong or because it reverses earlier decisions." *Id.* (citing Patterson v. Colorado, 205 U.S. 454 (1907)).

legal theories are used, judicially defensible confirmation of public rights in privately owned dry-sand beach will require proof of extensive public use of that particular land.

Two recent Maryland decisions illustrate a different focus in strictly applying common-law theories to protect private interests. In *Department of Natural Resources v. Mayor of Ocean City*,[52] the State and a rear-beach landowner sought to enjoin condominium construction and the issuance of a building permit by the City. The eastern front of the building was to be located on the dry-sand beach seaward of the vegetation line. The court affirmed the public right to use the foreshore but denied the injunction: "[T]he petitioners are attempting . . . under an assertion of the public's right to picnic and sunbathe on the dune . . . to deny the Developer a use of his property to which he has an otherwise lawful right."[53] Because a 1962 storm had severely eroded the land at issue, evidence of public use of that dry-sand area as a beach extended back only a few years. Finding that "[i]mplying a dedication solely through long public use without regard to any intent to dedicate on the part of the landowner is but a form of prescription,"[54] the court concluded that the evidence of public use after 1962 could not support an easement by prescription or a customary right. The court reached the same conclusion in a companion case based on similar facts.[55]

In a lengthy dissent, Judge Eldridge insisted that evidence of public use and government expenditure for sanitation, police, lifeguards, and preservation of the beach, both before and after the 1962 storm, created a "total picture of an *implied dedication*."[56] He maintained that the "exceptional nature of the ocean beach,"[57] as well as "compelling public interest"[58] should preclude construction and abrogation of public rights, at least seaward of the vegetation line.[59] The developer's claim might have been defeated by evidence of customary use of the beach as it existed before the 1962 storm. The storm may have brought him a literal windfall.

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52. 274 Md. 1, 332 A.2d 630 (1975).
53. *Id.* at 13, 332 A.2d at 637.
54. *Id.* at 8, 332 A.2d at 635.
55. Department of Natural Resources v. Cropper, 274 Md. 25, 332 A.2d 644 (1975).
56. Department of Natural Resources v. Mayor of Ocean City, 274 Md. at 22, 332 A.2d at 642.
57. *Id.* at 15, 332 A.2d at 639.
58. *Id.* at 22, 332 A.2d at 642.
59. *Id.*

The Maryland decisions demonstrate what *Hay v. Bruno* suggested: the resolution of conflicts among developers, established residents, and the general public will turn on state court application of common-law theories to evidence of public use of a particular tract. Regardless of statutory presumptions, every state will require a very high level of public use to confirm a public right in the dry-sand area. Some liberality in the court's construction of the elements of adverseness of public use and the owner's intent to dedicate will be necessary to preserve acquired public rights on the basis of prescription or dedication. Under any theory, the tendency of the courts to focus on the infringement of public rights by private owners, as the *Gion*, *Thornton*, and *Seaway* decisions suggest, or on the infringement of private rights by public use, as the Maryland cases suggest, may also be determinative. The task of securing public rights will be most difficult when the court does not accept the theory of implied dedication and the doctrine of customary rights is not advanced or is inappropriate. Finally, because the decisions have not clearly distinguished between the right to use the dry sand as a way of reaching the foreshore and as a recreational area, we must assume that the tests to confirm these public rights are the same, at least insofar as the strip of land between the high-water mark and the line of vegetation. The case law discussed illustrates that public rights in this dry-sand area are clearly in a state of flux.

B. God Must Have Loved the Public: Too Much of a Good Thing

A second group of cases, arising from overcrowding at municipal beaches, involves nonresident challenges to city ordinances that restrict access to beaches and beach facilities to residents. In *Borough of Neptune City v. Borough of Avon-by-the-Sea,*[60] the New Jersey Supreme Court defined the public trust doctrine as including recreational use of the foreshore and found that the upland area had been unequivocally dedicated to public beach purposes. Striking the ordinance at issue, which charged a larger fee to nonresidents than to residents for the use of the beach, the court held that the statute authorizing municipalities to charge beach user fees was a delegation of the state's police power over a dedicated beach.

60. 61 N.J. 296, 294 A.2d 47 (1972).

> [W]here the upland sand area is owned by a municipality — a political subdivision and creature of the state — and dedicated to public beach purposes, a modern court must take the view that the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.[61]

The decision allowed Avon to "limit, on a first come, first served basis, the number of persons allowed on the beach at any one time in the interest of safety."[62] Plaintiff nonresidents in *Gewirtz v. City of Long Beach*[63] were also successful in invalidating an ordinance restricting the use of a beach park to Long Beach residents and their guests. As in *Avon* the New York court emphasized the legislative delegation of public trust authority to the municipality and held that the original dedication of the park by local law to the general public had become irrevocable through thirty years of public use and city maintenance.

In *Avon* and *Gewirtz* the dedication of upland beach to public use operated to include these dry-sand areas in the public trust held by the state and delegated to the city government. Under this theory, public rights to use of these beaches then fell within the ambit of the equal protection clause of the fourteenth amendment.[64] According to Professor Black of Yale University, "the 'public,' for purposes of the 'public' easements and 'public' dedications that are the technical forms under which beaches are lawfully open, is the 'public' or the people, of the United States."[65] Beach access or use in areas where public rights have been secured by easement or dedication cannot be denied nor fees differentiated on the basis of residence in that municipality.

Nevertheless, beach communities obviously bear a heavy

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61. *Id.* at 308-09, 294 A.2d at 54.

62. *Id.* at 311, 294 A.2d at 56.

63. 69 Misc. 2d 763, 330 N.Y.S.2d 495 (1972). For a discussion of the city's use of federal funds for beach and oceanfront improvements as a factor in the court's decision, see Comment, 2 HOFSTRA L. REV. 301, 338-45 (1974).

64. For a detailed discussion of the denial of equal protection argument, see Note, 48 N.Y.U.L. Rev., *supra* note 4 at 390-93.

For an antidote to bureaucratic means of resolution and for what may be the quintessential assertion of the public right, see State v. Mizrahi, 149 N.J. Super. 143, 373 A.2d 433 (1977). The conviction of hapless bather Mizrahi, apprehended badgeless on his towel on the foreshore of Margate City, for violating the city's ordinance by not purchasing a beach admission badge and resisting arrest, was upheld, despite his pleas of *jus publicum* and the fourteenth amendment.

65. Black, *supra* note 48 at 441.

burden because of the unique attraction of the seashore. The obligation of the municipality does not extend beyond the protection of confirmed public rights in the beach itself. Recent community efforts to restrict the use of limited beach facilities have been more successful. In *Van Ness v. Borough of Deal*[66] a New Jersey Appellate Court allowed the city to reserve its beach club and a portion of upland dry-sand area for the exclusive use of Deal residents. In *Van Ness* the dry-sand area had never been dedicated, access to the foreshore was unimpaired, and other reasonably necessary changing and toilet facilities were available. The New Jersey court found similar factors in *Hyland v. Borough of Allenhurst*[67] and refused to extend the *Avon* equal protection rationale to beach facilities or to preclude the city from charging higher nonresident fees for beach club membership.

More so than with privately owned property, the problems involving municipally owned beaches should be amenable to resolution by legislation and state and regional planning. When public use of state beaches forces local expenditure for municipal services beyond what is reasonably returned in ordinary tourist spending, legislative authorization of fees for access, parking, and other facilities or state funding assistance for beachfront services may help to allocate the financial burdens of beach maintenance.[68] Coastal management planning that encourages the dispersal of beach visitors by providing reasonable access points, open shore space, and available parking along the coast may prevent problems of the *Avon* variety.[69]

C. South Carolina: Dedication, Prescription, and Dry Sand

As in other states, South Carolina case law suggests that confirming a prescriptive easement or implied dedication of dry-sand areas will command a heavy burden of proof regarding the nature and extent of public use. In South Carolina, too, prescription and implied dedication theories are closely related, and both are commonly advanced to secure public rights. A prescriptive easement requires a clear showing of continuous and uninterrupted use, adverse or under a claim of right, for a twenty-year statutory period.[70] The party asserting dedication must show

66. 145 N.J. Super. 368, 367 A.2d 1191 (1976).
67. 148 N.J. Super. 437, 372 A.2d 1133 (1977).
68. See notes 127-131 and accompanying text *infra*.
69. See notes 140-145 and accompanying text *infra*.
70. Shia v. Pendergrass, 222 S.C. 342, 348-49, 72 S.E.2d 699, 703 (1952).

"strict, cogent, and convincing" proof of acts on the part of the landowner that are "not . . . consistent with any construction other than that of a dedication"[71] and "an express or implied acceptance, evidenced either by public use or by the acts of the public authorities."[72] The doctrine of customary rights has not been advanced in South Carolina.

Two cases involving access ways and lakeside landing recreational areas illustrate the South Carolina Supreme Court's application of the theories of dedication and prescription to factual circumstances similar to those producing beach access litigation.[73] Plaintiffs in *Tyler v. Guerry*[74] were private citizens who had used a disputed road and landing; in *County of Darlington v. Perkins,*[75] the attorney general associated with the county as plaintiff.[76] On the surface, the cases are similar: in each action plaintiffs sought the declaration of a public right-of-way in a road leading to a lake and a permanent injunction against the landowners' interfering with public use of the landing area. In *Tyler* the court reversed and found neither dedication nor easement in the defendants' property. In *Perkins,* however, the court found that the road had been dedicated as a public right-of-way and that the public had acquired rights in the landing area by prescriptive use.

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71. Seaboard Air Line R. Co. v. Fairfax, 80 S.C. 414, 430, 61 S.E. 950, 956 (1908), *quoted in* Tyler v. Guerry, 251 S.C. 120, 126, 160 S.E.2d 889, 891 (1968). Note also another oft-cited requirement of proof to establish dedication: "[T]he conduct of the owner . . . clearly, convincingly, and unequivocally [must indicate] expressly or by plain indication, a purpose or intention to create a right in the public to use the land adversely to him and as of right." Town of Estill v. Clarke, 179 S.C. 359, 362, 184 S.E. 89, 90 (1936); *accord,* Livingston v. Nationwide Mut. Ins. Co., 295 F. Supp. 1122 (D.S.C. 1969); Derby Heights, Inc. v. Gantt Water and Sewer Dist., 237 S.C. 144, 116 S.E.2d 13 (1960); Shia v. Pendergrass, 222 S.C. 342, 72 S.E.2d 699 (1952). *See also* Note, *What Constitutes Intent to Dedicate,* 6 S.C.L.Q. 96 (1953-54).

72. Woodside Mills v. United States, 160 F. Supp. 356, 359 (W.D.S.C. 1958).

73. County of Darlington v. Perkins, No. 20539 (S.C. Sup. Ct., filed Nov. 15, 1977); Tyler v. Guerry, 251 S.C. 120, 160 S.E.2d 889 (1968).

74. 251 S.C. 120, 160 S.E.2d 889 (1968).

75. No. 20539 (S.C. Sup. Ct., filed Nov. 15, 1977).

76. The trial court observed that the State associated with Darlington County as plaintiff because

> this case represents one of the many increasing conflicts directly impacting public use of the State's waters. As public demand of protection of what may be conceived as public rights increases, so by necessity does State involvement. The *ancient public rights* in navigation, in fishing and in *recreation* associated with waters are, without question, in greater demand today than ever before in the State's history.

County of Darlington v. Perkins, slip op. at 3 (C.P. Darlington County, S.C. Sept. 17, 1976), *aff'd*, No. 20539 (S.C. Sup. Ct., filed Nov. 15, 1977) (emphasis added).

The cases may be distinguished on their facts. Evidence of public use of the roads and the landing and of county road maintenance was more extensive in *Perkins* than in *Tyler*. In its refusal to find a public right-of-way the *Tyler* court considered the abandonment of the old road and the owner's obvious efforts to deter public use of the new road.[77] In *Perkins* the landowners wanted to charge fees for access and use of the landing, but had not obstructed the way. The court in *Perkins* found that the public character of the road leading to the landing required the conclusion that the landing itself was "improved" and, therefore, subject to the public claim of right. In *Tyler* the court had placed considerable reliance on the finding that the landing area was unimproved, unenclosed woodland that had not been used for boats, as the landing in *Perkins* had, and was, therefore, not a proper public landing.[78]

Significantly, the court in *Tyler* applied the restrictive test of intent to dedicate: the owner's act must not be " 'consistent with any construction other than . . . dedication.' "[79] In contrast, the court in *Perkins* applied the test of whether "a reasonable inference of an intention to dedicate may be drawn" from the owner's acts.[80] The test applied in *Perkins* is plainly less stringent because it allows the intent to dedicate to be "manifested by the owner's *acquiescence* in continuous use of the land by the public under the claim of a general public right."[81]

Analogizing the tests applied in these decisions to beach access questions, we may surmise that dry-sand beach used for

77. The old road, which had been used for access to the river for over 50 years, was abandoned when the new road was built in 1958. People continued to use the new road. In 1961 or 1962 defendant owners put up a "no trespassing" sign, which was not effective, and in 1966 they blocked the road with chains and barbed wire, which were removed. Finally, they dug trenches in both roads to obstruct their use. 251 S.C. at 125-26, 160 S.E.2d at 890-91.

78. 251 S.C. at 124, 160 S.E.2d at 890. Citing State v. Randall, 32 S.C. Law 48, 1 Strob. 110 (1846), the court defined the term "landing" as " 'a place on a river or other navigable water for lading and unlading goods, or for the reception and delivery of passengers.' " *Id.* at 124, 160 S.E.2d at 890. The landing in *Tyler* was explicitly held not to fit this definition. The court observed that a prescriptive right cannot be created in "wild, unimproved, unenclosed woodland," implying that use of the area as a landing renders the land improved and susceptible to adverse claims.

79. Seaboard Air Line R. Co. v. Fairfax, 80 S.C. at 430, 61 S.E. at 956, *quoted in* Tyler v. Guerry, 251 S.C. at 126, 160 S.E.2d at 891.

80. No. 20539, (S.C. Sup. Ct., filed Nov. 15, 1977) (citing 23 AM. JUR. 2d *Dedication* § 21 (1965)).

81. *Id.* (citing 23 AM. JUR. 2d *Dedication* §§ 28-29 (1965)) (emphasis added). This language seems to be a deliberate departure from the stricter requirements of other decisions.

public recreation is as much a place of public significance as a landing on a navigable body of water. The *Perkins* decision suggests that when public rights-of-way lead to dry-sand beaches South Carolina courts will consider evidence of public use, public maintenance, and public interest, applying the theoretical and evidentiary tests employed in *Tyler* and *Perkins*. The apparent tendency of the court to relax its requirement of an unmistakable intent to dedicate and the association of the attorney general, as in *Perkins*, may ease the burden of plaintiffs seeking to confirm a public right. Any public interest argument for rights of access to the foreshore and use of dry-sand ocean beach may be inherently stronger than claims to lake shorefront property simply because of the particular recreational tradition associated with the seashore.

Two recent South Carolina cases involving accreted dry-sand property may influence the resolution of conflicts between public rights to recreational use of beaches and private rights of beach ownership.[82] Three kinds of interests are at issue: front-lot owners' rights of access and use of the dry sand between their property and the ocean; developers' ownership claims to accreted land between front-lot property and the foreshore; and public rights of access and use of the dry-sand beach. These South Carolina cases show that the peculiar susceptibility of oceanfront property to change by erosion and natural or artificial accretion may cause established beachfront owners and proponents of the public interest to become allied in actions to prevent development between existing buildings and the ocean.

In *Epps v. Freeman*[83] the South Carolina Supreme Court observed at the outset that land between the high-water mark and the original subdivision line had been "dedicated to the lot owners and public for common enjoyment."[84] A strip of land between the subdivision line and the front-lot owners' seaward property line, which was swash or submerged land at the time of development, had been filled by front-lot owners, creating dry land. The court found that this land accrued neither to those adjoining owners who had created dry land out of the swash nor to the original subdividers, whose heirs sought title to the prop-

82. Epps v. Freeman, 261 S.C. 375, 200 S.E.2d 235 (1973); State v. Beach Co., No. 75-cp-10-7 (9th Jud. Cir. S.C. July 20, 1977).

83. 261 S.C. 375, 200 S.E.2d 235 (1973).

84. *Id.* at 377, 200 S.E.2d at 236.

erty. The original platting of the land in dispute as an open area within the subdivision in front of the divided lots was held to be intended by the subdividers as a "representation that the area in question would remain open to the sea for the benefit of the lot purchasers . . . . [T]he defendants have a special property interest therein, whether by implied grant, estoppel, or otherwise, which bars plaintiffs from [their claim]."[85]

The defense that the disputed land had been dedicated to "defendants and to the public in general"[86] was enumerated, but not addressed by the court, apparently because the evidence presented was not primarily of use by the general public. The practical effect of this decision on public use remains as clouded as plaintiffs' title. Could the defendant front-lot owners sell their "special property interest" to plaintiffs and thus clear their title? This failing, defendants' special interests preclude development of the property, but their lack of title would also appear to prevent their denying others use of the property unless the use interfered with their interests. In that event, the dedicated beach has been extended for all practical purposes to the land in dispute. It is more likely that defendants would seek to purchase plaintiffs' interests in the land, valuable now only to defendants, thereby gaining title to the land for themselves. Since no public interests in the beach have been confirmed, defendants apparently would then be free to develop the property or use it as they wish.

The precedential value of the *Epps* decision is uncertain. It may suggest that the court is loath to confirm title in accreted dry-sand property when the effect would be to bar customary recreational use, whether by private residents or by the public in general. But the controlling theory is one of equitable estoppel, which is to be applied against a developer when private owners

85. *Id.* at 388-89, 200 S.E.2d at 242. The evidence plainly did not support the defendants' claims of adverse possession. Since the new land was artificially accreted, the plea of title by accretion at common law was removed. *See* notes 13-14 and accompanying text *supra.*

86. *Id.* at 379, 200 S.E.2d at 237. Citing Cason v. Gibson, 217 S.C. 500, 61 S.E.2d 58 (1950), defendants relied on the grantee-landowner's rights to assert the grantor-developer's dedication of adjacent property to the public, whether or not the dedication had been accepted. There was no attempt to demonstrate general public use of the disputed beach. Since defendant landowners in *Epps* operated motels, the finding of a special property right was probably the desirable result for them, because it allowed continued use of the beach by their guests and confirmed no rights in the general public. Brief of Respondents at 52-54. For discussion of dedication in this case, see also Brief of Appellants at 123-24 and Record at 514-17.

buy and improve property in reliance on the developer's representations that the land between their lots and the ocean will remain undeveloped.

State v. Beach Company,[87] a recent circuit court decision, suggests that the level of public use required to establish dedication or prescription will be quite high. In this widely publicized action to enjoin the leveling of sand dunes by the defendant developer-landowner on naturally accreted beach, the court found dedication in the eastern end of the disputed beach area, but not in the wider western area. The court did approve public easements "for access to the water at the ends of the cross streets"[88] on the undedicated western end and extended these easements across the accreted dry-sand beach. The use of these pathways was so obvious that the Beach Company conceded the right.[89] Although the State asserted dedication by acquiescence and public use and the court acknowledged greater evidence of eastern use, the case actually turned on plats of the earlier development. Arguments on appeal will probably abandon common-law dedication by prescription or implication and rely on the disputed plats and on an unusual 1927 South Carolina act accepting certain dedications from earlier developers.[90]

Beach Company again illustrates the common interests of beachfront landowners and the general public in preserving the status quo of established beaches. The court noted initially that numerous actions of beachfront landowners claiming private easements and rights-of-way between their lots and the foreshore were being held in abeyance pending the outcome of this suit.[91] Suits by these property owners landlocked by the accreted front beach might come to life if the State's action fails. These actions would involve claims of easements for access to and use of the whole beach. The confirmation of these private easements would probably bar any development of the accreted beachfront areas in dispute.[92]

The trial court in *Beach Company* emphatically stated that, where dedication to public use is confirmed, dedication protects

87. No. 75-cp-10-7 (9th Jud. Cir. S.C. July 20, 1977).

88. *Id.*, slip op. at 15.

89. *Id.*

90. No. 324, 1927 S.C. Acts 770; telephone interview with Kenneth P. Woodington, Assistant Attorney General of South Carolina, in Columbia, South Carolina (March 3, 1978).

91. State v. Beach Co., No. 75-cp-10-7, slip op. at 5 (9th Jud. Cir. S.C. July 20, 1977).

92. Telephone interview with Kenneth P. Woodington, note 90, *supra.*

public rights in the land from intrusion by private owners, in this case, for example, by destruction of the sand dunes.[93] Dedication cannot be revoked by adverse private uses without clear abandonment by the public.[94] Land naturally accreted onto land dedicated to public use will be subject to the same dedication or easement.[95] But the public rights confirmed in this case were not strongly contested on the basis of public use alone and the questions of rights to access and use of dry-sand beaches were not definitively framed in terms of prescription and implied dedication. A South Carolina Supreme Court ruling in the *Beach Company* case probably will not provide a controlling precedent in this area.

In summary, the South Carolina courts appear to be liberalizing older notions of implied dedication and upholding strong protections for land dedicated to public use. Because questions of accretion and of construction of plats and deeds have quite properly borne on every access decision rendered, the dispositions of actions involving conflicting public and private claims in oceanfront property are difficult to predict. Almost certainly more litigation will arise from situations similar to those in the *Epps* and *Beach Company* cases, when developers who retain a strip of beachfront property claim naturally accreted land between existing developed beachfront lots and the ocean.[96]

III. CODIFICATION OF EXISTING RIGHTS

A review of public beach access laws suggests some useful means for protection of existing public and private rights. Statutory provisions of California,[97] Guam,[98] Hawaii,[99] Oregon,[100] Texas,[101] and the Virgin Islands[102] are surveyed in this section.

93. No. 75-cp-10-7, slip op. at 18-20 (9th Jud. Cir. S.C. July 20, 1977). For a discussion of the leveling as a public nuisance, see *id.* at 20-28.

94. *Id.* at 10, 11, 19. For a discussion of the abandonment of public rights in beaches, see Note, *Hawaiian Beach Access*, 26 HASTINGS L. J. 845-47 (1975).

95. No. 75-cp-10-7, slip op. at 11, 29 (9th Jud. Cir. S.C. July 20, 1977).

96. Interview with Jean H. Toal, South Carolina State Legislator, in Columbia, South Carolina (March 15, 1978). Actions are now pending in the Cherry Grove and North Myrtle Beach areas in South Carolina. Arguments based on theories of dedication, public and private easement, equitable estoppel, and on the Coastal Zone Management Act, S.C. CODE ANN. § 48-39-120 (Cum. Supp. 1977) are contemplated. For discussion of this provision of the Act, see also notes 14-15 and accompanying text *supra*.

97. CAL. GOV'T CODE §§ 53035-53036, 54091-54093 (West 1966 & Cum. Supp. 1977).

98. GUAM GOV'T CODE §§ 13450-13460 (Cum. Supp. 1974).

99. HAW. REV. STAT. § 115 (Supp. 2 1975).

100. OR. REV. STAT. §§ 390.605-.630 (1977).

Beach access legislation is directed generally at setting public policy to protect the right to public access and use of beaches, to prohibit interference with these rights, to provide for confirming existing interests, and to authorize the acquisition of access ways. Definitions of the shoreline affected by the legislation uniformly include the stretch of dry-sand beach inland to the vegetation line.[103] Provisos in Texas and the Virgin Islands go further by stating that dredging and filling will not alter the line for purposes of the law.[104]

The individual statutes vary in their focus on access to the shore and use of the beach; however, both the rights of dry-sand use and the right-of-way to the sea probably were intended to be included in each piece of legislation. The protection of "free and uninterrupted use [of the ocean shore],"[105] the "right to use and enjoy the shorelines,"[106] a "fundamental right of free movement in public space and of access to and use of the sea,"[107] and the "free and unrestricted right of ingress and egress to and from" the beach are stated as policies of the acts.[108] The state's protection is clearly intended to extend only to shore land "where such use has been legally sufficient to create rights or easements in the public through dedication, prescription, grant or otherwise."[109] Texas also provides that in an action brought under the Act land seaward of the vegetation line carries a prima facie "prescriptive right or easement in favor of the public for ingress and egress to the sea . . . subject to proof of easement."[110] To the extent that public rights are acquired, beaches become public recreational resources of the state.[111]

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101. TEX. NATURAL RESOURCES CODE ANN. tit. 2, §§ 61.001-.131 (Vernon 1977).

102. V.I. CODE ANN. tit. 12, §§ 402-403 (Supp. 2 1976).

103. GUAM GOV'T CODE § 13453 (Cum. Supp. 1974); HAW. REV. STAT. § 115-5 (Supp. 2 1975); OR. REV. STAT. § 390.605 (1977); TEX. NATURAL RESOURCES CODE ANN. tit. 2, § 61.012 (Vernon 1977); V.I. CODE ANN. tit. 12, § 402(b) (Supp. 2 1976).

104. TEX. NATURAL RESOURCES CODE ANN. tit. 2, § 61.017(a) (Vernon 1977); V.I. CODE ANN. tit. 12, § 402(b) (Supp. 2 1976).

105. GUAM GOV'T CODE § 13451 (Cum. Supp. 1974); OR. REV. STAT. §390.610(1) (1977).

106. V.I. CODE ANN. tit. 12, § 402(a) (Supp. 2 1976).

107. HAW. REV. STAT. § 115-1 (Supp. 2 1975).

108. TEX. NATURAL RESOURCES CODE ANN. tit. 2, § 61.011 (Vernon 1977).

109. GUAM GOV'T CODE § 13450(d) (Cum. Supp. 1974); OR. REV. STAT. § 390.610(2) (1977). For the same effect see TEX. NATURAL RESOURCES CODE ANN. tit. 2, §§ 61.011-.012 (Vernon 1977), and V.I. CODE ANN. tit. 12, § 402(a) (Supp. 2 1976).

110. TEX. NATURAL RESOURCES CODE ANN. tit. 2, § 61.020(2) (Vernon 1977).

111. *See* GUAM GOV'T CODE §§ 13450(d), 13455-56 (Cum. Supp. 1974); OR. REV. STAT. § 390.610(3) (1977) (provisions for territory or state administration). For public rights as

The statutes expressly or implicitly prohibit interference with public rights.[112] State officers are empowered to deal with bars to public access by bringing actions to enjoin restraints[113] and to "protect, settle, and confirm all such public rights and easements."[114] Texas landowners are specifically given the corresponding right to determine their interests by bringing declaratory judgment actions.[115] Guam allows a beachfront owner to file a declaration of the rights that he permits the public to have in his property. The statement is "admissible as evidence of the intent of the owner . . . to exercise dominion and control over his property."[116] Government acquisition of property for beach access is specifically authorized in California, Guam, Hawaii, and Oregon.[117]

Beach access litigation in the states with strong legislative policies supporting the protection of confirmed public rights in beaches indicates that the statutes may provide some presumptive support, but are not dispositive. Although *Seaway Co. v. Attorney General*[118] and *State ex rel. Thornton v. Hay*,[119] two of the cases discussed above, were brought under beach access laws in Texas and Oregon, the legislation in each adds little to the analysis of the rights at issue. The statutes do provide a clear, but probably unnecessary justification of a state's right to bring actions to enforce this particular kind of public right.[120] Probably because he preferred to avoid the constitutional question of the

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the trigger to public protection, see TEX. NATURAL RESOURCES CODE ANN. tit. 2, §§ 61.001(5), .013, .018 (Vernon 1977).

112. TEX. NATURAL RESOURCES CODE ANN. tit. 2, § 61.013 (Vernon 1977); V.I. CODE ANN. tit. 12, § 403 (Supp. 2 1976).

113. TEX. NATURAL RESOURCES CODE ANN. tit. 2, § 61.018 (Vernon 1977).

114. GUAM GOV'T CODE § 13451 (Cum. Supp. 1974); OR. REV. STAT. § 390.620(1) (1977).

115. TEX. NATURAL RESOURCES CODE ANN. tit. 2, § 61.019 (Vernon 1977).

116. GUAM GOV'T CODE § 13460 (Cum. Supp. 1974). See discussion of common-law theories of prescriptive easements and implied dedication in notes 34-37 and 70-72 and accompanying text *supra*. Evidence of an owner's permission that his property be used can defeat a public claim of right based on use adverse to the owner.

117. CAL. GOV'T CODE § 54093 (West 1966 & Cum. Supp. 1977); GUAM GOV'T CODE § 13456 (Cum. Supp. 1974); HAW. REV. STAT. § 115-2 (Supp. 2 1975); OR. REV. STAT. § 390.630 (1977).

118. 375 S.W.2d 923 (Tex. Civ. App. 1964).

119. 254 Or. 584, 462 P.2d 671 (1969).

120. See cases discussed in Section II A and II C. Public officers apparently have not been challenged in bringing actions on behalf of public rights in beaches, whether specific statutory authority existed or not.

"taking" effect of this legal presumption, the Texas attorney general did not rely on that statute's prima facie easement provision and based the case instead on extensive public use of the beach.[121] *Hay v. Bruno*,[122] allowing the Oregon *Thornton* decision to stand, holds that the statutes are defensible in this respect precisely because the protection provided is conditioned on the confirmation of an existing public right at common law. Therefore, the law has not been changed in a way that takes property away from the owner.

In *United States v. St. Thomas Beach Resorts, Inc.*,[123] another decision which specifically addresses the validity of beach access legislation, the government based its action on the Virgin Islands Open Shorelines Act.[124] Defendant was enjoined from future obstruction and ordered to remove fences erected seaward of the vegetation line. Reciting evidence of notorious public use of the beach in question, the court found that the Act "merely [codified] this confirmed right" and was not unconstitutional under the fifth and fourteenth amendments.[125] Furthermore, the vegetation line description of affected shoreline was considered to "pass the [void-for-vagueness] constitutional muster with flying colors."[126] Even so, the decision suggests that an action based on public access rights could not succeed under any legislation without supporting evidence of extensive public use. The policy and presumptive value of the statute were undeniably significant, but were not solely determinative.

Texas and California deal specifically with the effects of public rights to beach access on oceanfront communities. California provides that public beaches and public property used as access ways to beaches must be open to all persons on equal terms and conditions without discrimination on the basis of "color, race, religion, ancestry, national origin, sex or residence."[127] Moreover,

121. TEX. NATURAL RESOURCES CODE ANN. tit. 2, § 61.020 (Vernon 1977). *See* Note, *Open Beaches Act: Public Rights to Beach Access*, 28 BAYLOR L. REV. 383, 387, 389 (1976). For comments on the congressional determination of a presumption of a public right to beach access and the basis of this right in custom and history, see Black, *supra* note 48, at 446-47.

122. 344 F. Supp. 286 (D. Or. 1972).

123. 386 F. Supp. 769 (D.V.I. 1974). The court found that the submerged land on which the fences were constructed belonged to the United States. *Id.* at 771.

124. V.I. CODE ANN. tit. 12, §§ 402-03 (Supp. 2 1976).

125. 386 F. Supp. at 772.

126. *Id.* at 773.

127. CAL. GOV'T CODE § 54902 (West 1966 & Cum. Supp. 1977).

local agencies may not transfer real property affording access to the shore without reserving the public right of access or making an alternative route available.[128] Texas law delegates to shore counties and municipalities the authority to regulate beach traffic and littering.[129] Further, it finds that the public policy of open beaches creates "a responsibility for the state . . . as trustee for the public to assist local governments in the cleaning of beach areas which are subject to the access rights of the public. . . ."[130] The Act makes State funds available for beach maintenance upon the applicant's meeting certain conditions, among them free entrance to all public beaches and the establishment of at least one beach park by the applicant county or city.[131]

State laws regarding public access to beaches plainly parallel litigation of questions involving disputed privately owned property and controlled access to municipally owned beaches. Apparent from the subsequent litigation is the failure of the laws to answer the basic questions of what public access and recreational rights to beaches are protected. The deterrent effect of the legislation is not known. State coastal management programs subject to federal coastal management regulations and addressed to more comprehensive problems of preservation and development may be more effective in resolving and reducing conflicts arising over public use of dry-sand beaches.

IV. Coastal Zone Management Legislation

A. *The Need for State Control*

The South Carolina Coastal Zone Management Act is indicative of the acute national awareness of the promise and the problems of the oceanshore. The Act repeats verbatim congressional findings in the Federal Coastal Zone Management Act of 1972[132] that

> (b) The coastal zone is rich in a variety of natural, commercial, *recreational,* industrial, and esthetic resources of immediate and potential value to the present and future well-being of the Nation;
> (c) The *increasing and competing demands upon the lands*

128. *Id.* § 53036.
129. Tex. Natural Resources Code Ann. tit. 2, § 61.122 (Vernon 1977).
130. *Id.* § 61.062.
131. *Id.* § 61.068, .069(4)-(5).
132. 16 U.S.C. §§ 1451-1464 (1972).

> *and waters* of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, *recreation*, extraction of . . . fossil fuels, . . . navigation, waste disposal and harvesting of fish, . . . have resulted in the loss of living marine resources, . . . permanent and adverse changes to ecological systems, *decreasing open space for public use*, and shoreline erosion.[133]

These conclusions are supported in the legislative history of the Federal Act.[134] Presently the nation's seven largest metropolitan areas and half its population are located in the counties bordering the Great Lakes and oceans. By the year 2000 there will be an estimated two hundred million shoreline county residents. Housing development is predicted to pose the greatest threat to the preservation of tidelands areas.[135]

With 187 miles of oceanfront beach, 2700 miles of shoreline,[136] 603,200 coastal county residents[137] and an expected increase in this number to 752,300 by the year 1990, South Carolina's conformity with this national picture is obvious.[138] The General Assembly found that "present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate."[139] The findings emphasize concern that the State regulate its own coastal zone: "A variety of federal agencies presently operate land use controls and permit systems in the coastal zone. South Carolina can only regain control . . . by developing its own management program . . . [and by encouraging] the state and local governments to exercise their full authority over the lands and waters in the coastal zone."[140]

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133. *Id.* § 1451(b)-(c); S.C. CODE ANN. § 48-39-20(A)-(B) (Cum. Supp. 1977) (emphasis added).

134. *See* S. REP. No. 277, 94th Cong., 2d Sess. 1, 4, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 1768, 1771-72.

135. The Senate Committee on Commerce, recommending passage of the 1976 amendments to the Coastal Zone Management Act of 1972, discussed findings of various reports by the Interior Department, the National Ocean Policy Study, and the Technology Assessment Advisory Council of the Congressional Office of Technology Assessment. For a thorough exposition of the factual background and professional recommendations leading to support of this legislation, see *id.* at 1768-87.

136. Wyche, *supra* note 2, at 81.

137. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, BULL. No. 76-40 (1977).

138. DIV. OF RESEARCH AND STATISTICAL SERVICES, S.C. BUDGET AND CONTROL BD. POPULATION PROJECTION STUDY FOR 1990 (1976).

139. No. 123, § 1(F) 1977 S.C. Acts 225.

140. *Id.* § 1(C). The federal agencies referred to here include the Army Corps of Engineers, the Coast Guard, the Bureau of Wildlife and Fisheries, and the Federal Power Commission. Note, however, that in 1969 six federal bills were introduced in Congress that

The opportunity for the exercise of state and local authority is clear. The 1976 amendments to the Federal Coastal Zone Management Act make formulation of a specific plan for access to public beaches[141] mandatory for states seeking planning development grants under the Act;[142] the amendments authorize funds for assistance in implementing these management plans.[143] Proposed federal rules under these sections require that a state identify shorefront areas appropriate for public access, articulate state policies regarding shorefront access, and indicate available funding programs and management techniques.[144] The new legislation "represents a determination . . . to give further emphasis to protection of and access to the [oceanfront] areas mentioned. [I]t is . . . not a mandate . . . to provide any specific protection and access."[145]

The South Carolina Coastal Zone Management Act created an eighteen-member Coastal Council empowered to hire staff members, to develop a management program for the State, and to provide for the administration and enforcement of the program.[146] The structure of planning that affects access to South

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declared a prima facie public right of access to the sea in the area seaward of the vegetation line. Discussion of the Eckhardt "Open Beaches Bill" continued for at least four years. Because the 1976 amendments to the Federal Coastal Zone Management Act provide only threshold, essentially advisory, requirements, it is unlikely that legislation will long preclude interest in a federal enactment in this mode. *See* Eckhardt, *supra* note 4; Black, *supra* note 48; and Comment, *Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches,* 25 U. FLA. L. REV. 586, 595 (1973).

141. 16 U.S.C. § 1454(b) (1976) requires that the "management program for each coastal state shall include . . . (7) A definition of the term 'beach' and a planning process for the protection of, and access to, public beaches . . . ."

142. 16 U.S.C. § 1454(a) (1976) (amending 16 U.S.C. § 1454(a) (1972)) provides for grants to any coastal state for assistance in the development and completion of a management program and for the initial implementation of the program. The 1972 Act required that a plan be completed and development funding ended before a state was eligible for implementation funds. When § 1454(b) was amended by the 1976 Act to add beach access, the environmental impact of energy facilities, and erosion control as planning factors, interim periods of overlap funding became necessary. *Id.* § 1454(b) (1976) (amending *id.* § 1454(b) (1972)).

143. 16 U.S.C. § 1455 (1976) (amending 16 U.S.C. § 1455 (1972)) provides for annual administrative grants for any state program meeting requirements of § 1454 and § 1455. These grants are limited to 80% of the state's costs. *Id.* § 1455 (1976). 16 U.S.C.A. § 1461 (1976) (amending 16 U.S.C. § 1461 (1972)), which formerly provided for 50% grants for acquisition of estuarine sanctuaries, now also allows acquisition funding for lands to provide access to beaches and to preserve islands. A 1972 proviso precluding the use of § 1454 and § 1455 funds for acquisition under § 1461 has been eliminated. *Id.* § 1461 (1972).

144. 43 Fed. Reg. 8402 (1978) (shorefront access and protection planning).

145. S. REP. No. 277, 94th Cong., 2d Sess. 33, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 1768, 1801.

146. S. C. CODE ANN. §§ 48-39-40 to -50 (Cum. Supp. 1977). Under the 1976 amend-

Carolina beaches, the definition of "public beaches," and the determination of existing rights in the ocean shore will emerge from South Carolina statutory and common law and from policy and regulations promulgated under the coastal management program.[147]

B. The South Carolina Coastal Zone Management Act: A Perspective

That South Carolina public policy supports the public right to access and use of state beaches is apparent in the form and substance of the Coastal Zone Management Act.[148] The administrative standards established for coastal construction, the development of erosion control policy, and the incorporation of local laws into the management plan provide important safeguards and planning opportunities in the area of beach access. Coastal Council staff members predict that specific provisions regarding public use of beaches will emerge as policy statements in the management plan, rather than as additional legislation.[149] Final Rules and Regulations of the South Carolina Coastal Council[150] emphasize the environmental and economic importance of the tidelands, the "strong and growing pressure for the development of these areas,"[151] and the need not to prohibit development, but

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ments and regulations promulgated under these amendments, beach access plans are to be submitted after Oct. 1, 1978 and before Sept. 30, 1979. 16 U.S.C.A. § 1454(b),(i); 43 Fed. Reg. 8403 (1978).

147. S.C. CODE ANN. § 48-39-80 provides as follows:

> The Council shall develop a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this act and any rules and regulations promulgated under this act. In developing the program the Council shall:
>
> (A) Provide a regulatory system which the Council shall use in providing for the orderly and beneficial use of the *critical areas.*
>
> (B) In devising the management program the Council shall consider all lands and waters in the coastal zone for planning purposes.

(emphasis added). Note that "beaches" are "critical areas" under *id.* § 48-39-10.

148. S.C. CODE ANN. §§ 48-39-10 to -220 (Cum. Supp. 1977).

149. Interview with Harriett Knight, Coastal Council staff planner, in Charleston, South Carolina (Dec. 28, 1977).

150. 2 S.C. State Reg. No. 7, 14 (1978). These regulations were proposed to the 1978 South Carolina General Assembly pursuant to the Coastal Zone Management Act, S.C. CODE ANN. § 48-39-50(C) (Cum. Supp. 1977), and will take effect ninety days after their submission unless disapproved by the General Assembly, pursuant to the South Carolina Administrative Procedures Act, S.C. CODE ANN. § 1-23-120 (Cum. Supp. 1977). These regulations become final on June 7, 1978, and copies may be obtained from the Office of Coastal Planning, 4 Carriage Lane, Suite 205, Charleston, South Carolina 29407.

151. Rule 30-11(A), 2 S.C. State Reg. No. 7 at 37 (1978). *See also* Rule 30-1 (A), *id.* at 20-21; Rule 30-1(B), *id.* at 21-22.

to realize "the range of favorable and unfavorable results . . ., determine priorities, evaluate alternatives, anticipate impacts, and suggest the best methods and designs to carry out wise development of these resources."[152] Highlighting the significance of beaches, the Statement of Policy records that "aesthetically, the beaches are a unique experience, and recreationally, these areas are increasingly needed."[153] It is this uniqueness that makes South Carolina beaches desirable development locations and makes sound regulation "essential to protecting the resources as well as protecting lives and property."[154]

1. Permitting Authority

The South Carolina Coastal Council is empowered "[t]o examine, modify, approve or deny applications for permits for activities covered by [the Act]":[155] specifically, construction in "critical areas of the coastal zone."[156] Beaches are designated as critical areas.[157] As in other states, the statutory definition of beaches, "those lands subjected to periodic inundation by tidal and wave action so that no non-littoral vegetation is established,"[158] includes the foreshore and the dry-sand area to the line of vegetation. Because "primary ocean front sand dunes" are also critical areas,[159] the dry-sand beach subject to the Council's licensing authority extends to the "landward trough" of a front

152. Rule 30-1(A), *id.* at 21.
153. Rule 30-1(B), *id.* at 21.
154. Rule 30-1(B), *id.* at 22.
155. S.C. CODE ANN. § 48-39-50(G) (Cum. Supp. 1977).
156. *Id.* §§ 48-39-30(B)(1), -130.
157. *Id.* § 48-39-10(J).
158. *Id.* § 48-39-10(H). *See also* Rule 30-10(B)(1), 2 S.C. State Reg. No. 7 at 36 (1978). The Rule quotes the statutory definition and elaborates: "The boundary of the beach critical area shall extend from the waters landward to a point that is not periodically inundated by tidal or wave action; this point is usually delineated as the landward edge of the beach zone where nonlittoral vegetation begins." *Id.*

Council and staff members interpret "periodic inundation" to mean the highest point tides might normally reach over a long period of time (not including hurricane tide) as opposed to the more specific, astronomically based definition approved by the United States Supreme Court: "the average height of all the high waters over . . . a period of 18.6 years . . . ." Borax Consol. Ltd. v. Los Angeles, 296 U.S. 10, 26-27 (1935), *rehearing denied,* 296 U.S. 664 (1935). "Nonlittoral vegetation" is that plant life that could not survive in areas of periodic inundation; therefore, the line of vegetation is an indication of the point where periodic inundation does not reach. Interviews with Harriett Knight, Coastal Council staff planner, and Rick Dawson, staff biologist, in Charleston, South Carolina (Dec. 28, 1977); telephone interview with Ben Gregg, Council staff attorney (Feb. 15, 1978).

159. S.C. CODE ANN. § 48-39-10(J) (Cum. Supp. 1977).

dune if its crest is within 200 feet of the mean high-water mark or to the seaward side of a permanent building located seaward of a primary dune and within the 200 feet area.[160]

The Act provides that as a critical area, beach property cannot be subject to "a use other than the use [it] was devoted to" on September 28, 1977, without a permit from the Coastal Council.[161] This provision would appear to have the effect of conditionally freezing the use and development of shoreline property and thereby preserving acquired rights in that land.[162] Construction or development that might restrict preexisting access to beach areas now must be approved by the Council upon considerations including "[t]he extent to which the development could affect existing public access to . . . beaches or other recreational coastal resources."[163] The Council is further required to hold a public hearing on any permit application at the request of twenty affected citizens, and it may condition a permit "upon the applicant's amending the proposal to take whatever measures the Council feels are necessary to protect the public interest."[164] Construction in violation of the Act can be restrained by a circuit court with jurisdiction "at the suit of the Council, the Attorney General, or any person adversely affected."[165]

Concerning the question of access to and use of beaches, the protection afforded by the Council's permitting authority is two-

160. Rule 30-10(B), 2 S.C. State Reg. No. 7 at 37 (1978).

161. S.C. CODE ANN. § 48-39-130(A) (Cum. Supp. 1977). Note the ninety day grace period to allow notice. Section 130(C) states that:

> a person who has legally commenced a use [in a critical area before September 28, 1977] such as those evidenced by a state permit or issued by the Budget and Control Board, or a project loan approval from the Rural Electrification Administration or a local building permit or has received a United States Corps of Engineers or Coast Guard permit, where applicable, may continue such use without acquiring a [Coastal Council] permit.

Id. § 48-39-130(C). Section 130(C) also requires permits for all dredging, filling and construction in critical areas. *Id.* Section 130(D) excepts emergency government action, minor routine hunting, fishing, and research structures, and other maintenance and sanitation activities otherwise permitted by law. *Id.* § 48-39-130(D).

162. Unless the public simply abandoned its use of an access way or stretch of beach, any development would be subject to review by the Coastal Council with past and continued use as a factor in the determination of a project's feasibility.

163. S.C. CODE ANN. § 48-39-150(A)(5) (Cum. Supp. 1977). See note 167 and accompanying text *infra.*

164. *Id.* § 48-39-150(B). Section 150(D) provides for appeal to the Council by an applicant denied a permit or by "any person adversely affected by the granting of the permit." *Id.* § 48-39-150(D). Whether an applicant must demonstrate an adverse effect different from that on the general public is not clear. *See* notes 24 and 158, *supra.*

165. *Id.* § 48-39-160. *See* note 24 and accompanying text *supra.*

fold: existing public access to beaches must be considered in granting or denying permits, and beaches and primary sand dunes are protected as critical areas subject to permitting authority. The Council will probably construe the term "public access" to mean routes used to reach the beach, as opposed to meaning the accessibility of beaches to the public for general use.[166] Therefore, permitting decisions would take into account whether proposed development would interfere with customary public use of upland pathways and streets leading to the beach as well as ways across the dry sand itself. A permit could be made conditional on the preservation of those rights-of-way. Additionally, it is likely that protection of the beach and front dunes as critical areas will also have the effect of preserving dry-sand areas for customary recreational use.

The Coastal Council is mandated to approve or deny permits based on the individual merits of the application, the policies set forth in the Act, and ten comprehensive biological, ecological, economic, and social considerations.[167] That the Council is not authorized to decide questions of ownership is explicit in the Act, which provides that actions to determine "any right, title, or interest" in the tidelands must be brought against the State by serving process on the State Budget and Control Board and that State law affecting these interests can be changed only in this manner.[168] Draft regulations emphatically support the intentional exclusion of ownership questions from the Council's power.[169]

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166. Interview with Harriett Knight, Coastal Council staff planner, and with Ben Gregg, Council staff attorney, note 158 *supra.*

See No. 123, § 10 1977 S.C. Acts 233. Section 10(A) provides for Coastal Council assistance to local governments; section 10(B) provides for Council evaluation and approval of a current ordinance affecting critical areas under the Act. Section 10(C) allows a local government without current ordinances that conform to Act requirements to elect to develop its own program for critical areas; section 10(D) provides for a local government's delegation of its section 10(C) responsibility to the appropriate regional council of government.

167. S.C. CODE ANN. § 48-39-150(A) (Cum. Supp. 1977). In addition to existing public access to beaches, the considerations also include "[t]he extent of the economic benefits as compared with the benefits from preservation," *id.* § 48-39-150(A)(7), and "[t]he extent to which the proposed use could affect the value and enjoyment of adjacent owners." *Id.* § 48-39-150(A)(10). *See also* Rule 30-11(B), 2 S.C. State. Reg. No. 7, at 37-38 (1978) (incorporating the statutory considerations).

168. S.C. CODE ANN. § 48-39-220(A) (Cum. Supp. 1977).

169. Rule 30-4(F), 2 S.C. State Reg. No. 7 at 27 (1978): "No permit shall convey, nor be interpreted to convey, a property right in the land or water in which the permitted activity is located. No permit shall be construed as alienating public property for private use or as alienating private property for public use."

When public or private rights are disputed in property for which a permit is sought, the resolution of conflicting claims logically should precede any permitting decision. Since the Act requires that a party seeking a permit provide evidence of his interests in the affected property, another party claiming interests in the land should be able to bring an action to enjoin the Council from permitting the activity until the rights in the property are determined pursuant to the Act.[170] Because the action provided in section 48-39-220 is essentially a suit to determine interests in the property, the attorney general should be able to bring an action asserting public rights in the property.

In addition, where dry-sand beach property beyond critical areas that has been used customarily by the public is threatened by construction otherwise likely to be allowed, the traditional judicial action to enjoin activity that would interfere with public rights in the property remains. Whatever the fact situation, the viability of this course of action would depend to some degree on the ability and willingness of the attorney general or of some concerned private party to initiate a public claim.

2. *Erosion Control*

Coastal Council authority to develop and institute erosion control policy,[171] to issue permits for erosion control structures,[172] and to expend public funds for shore erosion control in "areas where the public has full and complete access"[173] should also have the effect of preserving beaches for public access and use. The proposed regulations express a clear preference for the "use of natural features of the dune and beach system rather than artificial protection . . . ."[174] Among the criteria considered in permit-

170. S.C. CODE ANN. § 48-39-140(B)(4) (Cum. Supp. 1977). Coastal Council policy regarding uncertain but officially unasserted public rights in "private" land is unsettled. It is not unlikely that public interests may be asserted as the basis for appealing a permit, where the Council has granted one in reliance on the applicant's claim of ownership. On the other hand, where a permit is denied, apparently because of doubtful claims, the issues may be raised by the purported owner either in an action under § 48-39-220 or in an appeal of the permit denial.

171. S.C. CODE ANN. § 48-39-120(A) (Cum. Supp. 1977).

172. *Id.* § 48-39-120(B).

173. *Id.* § 48-39-120(D) authorizes the Council to accept and administer federal funds. Section 120(E) provides for the use of available state funds in the event of "beach or shore erosion emergency." *Id.* § 48-39-120(E).

174. Rule 30-13(A)(2)(a), 2 S.C. State Reg. No. 7 at 52 (1978), excepts from this policy "critically eroding shorelines that have a direct measurable effect on the economic well-being of an applicant or are a threat to the public safety."

ting jetties and groins is that "care . . . be taken to insure that they do not interfere with public access . . . ."[175] Recognizing the importance of the beach and dune system "to storage of sand and shoreline stability . . . [and] as a barrier which protects adjacent inland areas," the Statement of Policy finds that "enough room [should] be allotted between structures and the shoreline so that if natural erosion occurs, natural deposition can restore the beach . . . ."[176] In the event of natural or artificial accretion, provisos affecting the Coastal Council's erosion control authority require that land seaward of the mean high-water mark that existed at the time of development remain undeveloped.[177] All of these specifications in erosion policy and application should promote the permitting only of erosion control devices and other structures that are consistent with existing public use and access.

The term "existing public access" must be defined (1) for purposes of the federally required management plan for public access,[178] (2) as a required consideration in every permitting decision,[179] and (3) as a condition precedent to the use of public funds.[180] Logically, the term should be defined in a single way. Because erosion control is critical in so many areas, the condition attached to funding may work to lower the level of use required to constitute public access for purposes of erosion control as well as for the permitting of all construction. The clear requirement that public access be a factor in any permitting decision for erosion controls and the policies of preserving and protecting critical beach areas will be significant in the preservation of existing public rights of access and use of beach property.

3. *Local Ordinances*

The third means of protecting and assuring public access rights afforded by the Coastal Zone Management Act is the Council's power to approve local ordinances affecting critical areas as part of the overall plan.[181] Ordinances dealing with criti-

175. Rule 30-13(C)(2)(c), *id.* at 54.

176. Rule 30-1, *id.* at 22.

177. S. C. CODE ANN. § 48-39-120 (Cum. Supp. 1977). For discussion of the provisos, see note 14 and accompanying text *supra.* For South Carolina cases involving accreted land, see notes 82-85 and accompanying text *supra.*

178. *See* notes 141-45 and accompanying text *supra.*

179. S.C. CODE ANN. § 48-39-150(A)(5) (Cum. Supp. 1977).

180. *See* note 173 and accompanying text *supra.*

181. S.C. CODE ANN. § 48-39-100(B) (Cum. Supp. 1977).

cal areas that do not meet the requirements of the Act would be superceded by the Act and the implementing regulations of the Council. When critical areas are not involved, the Council has no authority over specific local ordinances that might affect public access to beaches. The Council does, however, have a duty to cooperate with local governments and to make "[r]ecommendations to local and regional governmental units as to needed modifications or alterations in local ordinances. . . ."[182] These recommendations will surely be influenced by developing interpretations of the federal regulations concerning the consideration of public access to beaches in the management plans.[183]

The most powerful tool of municipalities is subdivision regulation.[184] By considering beaches to be a necessary kind of open space and access ways as essential to the enjoyment of that space, the Council might recommend that shorefront communities require developers at least to dedicate public easements to preserve existing rights-of-way to the ocean.[185] A recommendation that

182. *Id.* § 48-39-100(A).

183. *See* notes 141-45 and accompanying text *supra.*

184. For a discussion of subdivision exactions as a tool to insure adequate public rights to beach access, see Note, 22 STANFORD L. REV. 564, *supra* note 4 at 567-72.

185. The Beaufort County proposed ordinance suggests one approach. Its impact is limited since the developer is not required to provide reasonable access, if negotiations involving the County's purchase of land are unsuccessful.

> Section 5.3.2.2. PUBLIC BEACH ACCESS REQUIRED. Public beach access shall be provided by the developer for any development including more than one-thousand (1,000) feet of beach frontage according to the provisions of Sect. 5.3.2.3.
>
> Section 5.3.2.3. OPTION TO PURCHASE BEACH ACCESS. Upon filing of a preliminary application for an oceanfront development plan with the Planning Commission, Beaufort County shall have an option to purchase reasonable beach access as deemed necessary for the general welfare and benefit of the public. The county's option to purchase beach access shall run from the date of first submission of plans to the Planning Commission, to the date of the second regular County Council meeting following the first regular meeting of the Planning Commission after submission.
>
> The Planning Commission shall review a proposed oceanfront development as to the need for public beach access and shall recommend to County Council what action it feels the county should take as regards public beach access area in the best interest of the general public. The County Council shall notify the developer of the intentions on the option by the end of the specified option period, and shall, if electing to purchase the beach access area(s), have a period of thirty (30) days, and one extension period of thirty (30) days, from the end of the option period, to negotiate the terms of the purchase with the developer. The County Council may cause to be made an appraisal of the required beach access area(s) by a board of at least three (3) independent appraisers in order to establish the basis for a purchaser offer to the developer for the beach access area.

development plans insure reasonable access routes, adequate dry-sand space, and parking facilities for members of the community and for visitors would be advisable. In many cases these requirements would effect confirmation of existing rights in previously undeveloped property by incorporating frequently used beaches and pathways into development plats as dedicated public areas. These types of provisions would alleviate some of the problems involving conflicts over particular areas and overcrowding where access is difficult or not proportionate to the permanent and tourist population of the region.

South Carolina enabling law provides that subdivision regulations under local governing authority may "provide for the harmonious development of the municipality and the county," permit "the dedication or reservation of land for streets, school sites and recreation areas," and encourage "a distribution of population and traffic which will tend to create conditions favorable to health, safety, convenience, prosperity, or general welfare."[186] The above proposals concerning local development regulation would surely fall within the delegated police power and would be easily related to the public health, safety, and welfare. If requirements for development of subdivisions include only the reservation of public rights in access ways and in the dry-sand beach critical areas below the vegetation line, unreasonable taking or arbitrariness of application should not be problems. The regulations would simply reflect the controlling policy of the South Carolina Coastal Zone Management Act and its parent legislation.

When established communities find their access ways and open-beach space for public use inadequate, acquisition authority and some federal funding may be available.[187] Additionally a municipality might provide for an administrative determination of existing rights similar to that of a declaratory judgment, available at the request of a landowner or the municipality. Where public rights are confirmed or acquired or where the owner chooses to make a formal dedication, the city would assume sani-

186. S.C. CODE ANN. § 6-7-1030 (1976).

187. The South Carolina Coastal Council does not have eminent domain powers. Because of the substantial state ownership of beaches here and the probability of only limited available funds, it is unlikely that South Carolina would attempt to qualify for federal acquisition funds by virtue even of another state agency's power. Interviews with Harriett Knight, Coastal Council staff planner, and with Ben Gregg, Council staff attorney, note 158 *supra*. *See also* S.C. CODE ANN. § 48-39-30(C) (Cum. Supp. 1977).

tation and police services in the area as it presumably would when newly developed property is dedicated.[188]

Through its recommendations and approval authority the Coastal Council can substantially influence the shape of local ordinances, not only to protect public rights, but to insure that private beachfront landowners and municipalities do not bear an unfair share of the costs of public use. A provision for additional state financing of necessary beach services may ease the burden in communities where beaches are especially popular and accessible.[189] Requirements for local planning that assure reasonable access to the whole oceanfront of the State should work to prevent overcrowding and to preserve beaches for recreational use by coastal residents and the general public.

V. CONCLUSION

By the public trust doctrine expressed in *Cape Romain Land & Improvement Co. v. Georgia-Carolina Co.* and subsequent case and statutory law, the right of the public to use the South Carolina foreshore for recreational purposes is clear. The controls imposed on dry-sand beaches below the vegetation line by the South Carolina Coastal Zone Management Act place that land in trust for the people to protect the land from erosion resulting in preservation of the beaches for continued recreational use.

Historically, conflicts concerning public access to beaches have arisen when rights-of-way to the shore or particular areas of dry-sand beach were enclosed or obstructed so that people could not reach the foreshore where the public's right to use was clear. Successful actions to confirm public rights under these circumstances in South Carolina on any theory of prescription, dedication, or custom will require extensive proof of continued use. This State should be able to avoid some of the problems that have produced litigation elsewhere by the comprehensive regional and local planning mandated by State and federal coastal zone management legislation.

Taken together, the individual provisions of the South Carolina Coastal Zone Management Act provide as much or more

188. Public services are a material indication of a public right by prescription or of acceptance by the public of a dedication of land. A landowner in whose property the public has acquired rights should be able to receive services commensurate with that public use.

189. For Texas law dealing with these problems, see notes 129-131 and accompanying text *supra*.

protection of public rights in beaches as do the specific statutes providing for these rights in other states. Furthermore, the policies and procedures of the Act require planning for existing as well as prospective beach access rights in undeveloped, established, and already overcrowded areas. The exercise of South Carolina Coastal Council regulatory authority will be central in determining the development of coastal areas and in protecting and insuring public rights to recreational use of beaches.

Mary Lowndes Bryan